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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY TYRONE TOLES,

Defendant and Appellant.

B206798

(Los Angeles County  
Super. Ct. No. LA057091)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Elizabeth A. Lippitt, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, David C. Cook and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Terry Tyrone Toles, also known as Sergio G. Macias and Terry Tyrone, appeals from the judgment entered upon his conviction by jury of petty theft with priors (Pen. Code, §§ 666, 484).<sup>1</sup> The trial court found to be true that appellant had suffered a prior petty theft within the meaning of section 666 and a prior felony strike within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). It denied appellant's *Romero*<sup>2</sup> motion and sentenced him to an aggregate state prison term of six years. Appellant contends that the trial court abused its discretion in refusing to strike his prior felony strike.

We affirm.

### **FACTS<sup>3</sup>**

On October 11, 2007, at approximately 8:00 p.m., appellant and Albert Fry<sup>4</sup> were near Lankershim Boulevard and Camarillo Street, in North Hollywood, tampering with, hitting and trying to open the doors to three newspaper vending machines. Appellant lifted the center machine off its stand, laid it on its back on the ground and began banging and damaging it. Appellant then placed the machine back on its stand, and he and Fry walked away. There were no coins left in the coin box in the damaged vending machine, which had its nuts and bolts broken off, and there were a few coins and slugs on the ground around the area. The damage to one of the machines, which was worth \$450, rendered it unsalvageable.

### **DISCUSSION**

#### ***Background***

Before sentencing, appellant made a *Romero* motion, seeking to dismiss his prior strike on grounds that it was more than 30 years old, his current offense was minor, and

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

<sup>3</sup> Because the issue raised by appellant pertains to sentencing, we provide only a cursory statement of the underlying facts.

<sup>4</sup> Fry was charged and tried with appellant but was acquitted.

he had lived crime free for the last eight years. The trial court denied the motion, stating: “Under the circumstances, it appears that striking the strike under *People v. Romero* is not appropriate in this case. The history of this particular individual, Mr. Terry Toles, has been frequent, often, and lengthy. I think the record speaks for itself.”

Appellant’s criminal record reflects at least 15 or more convictions, most of which were for petty theft, the same offense of which he was convicted in this matter. It also reflects numerous probation and parole violations. The trial court found that he violated probation in 1989, 1990, twice in 1991, 1992, 1993, and 1998. He also violated parole in 1994, 1996, 1998, and 2000. Since his last conviction in 2000, he twice violated parole. Between 1986 and 2000, appellant was convicted of a crime approximately every two years.<sup>5</sup>

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<sup>5</sup> The record reflects that appellant was convicted as follows: (1) on September 7, 1979, as a 17-year-old juvenile, committed to the California Youth Authority for an April 12, 1979 armed robbery (§ 211) and grand theft from person (§ 487.2); (2) on April 23, 1986, convicted of second degree burglary (§ 459) and placed on 36 months probation; (3) in 1989, pled guilty to failure to appear after written notice (§ 853.7), after being charged with evading pay fare (§ 640, subd. (a)), and released on credit for time served; (4) on April 14, 1989, convicted of misdemeanor possession of burglary tools (§ 466), placed on probation for two years, two days in jail; (5) on August 14, 1990, convicted of misdemeanor petty theft with priors (§ 666) and placed on probation for two years, 90 days in jail; (6) on November 25, 1991, convicted of misdemeanor theft/petty theft with priors (§§ 484, subd. (a), 666) and placed on probation for one year, 30 days in jail, and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364) and sentenced to 30 days in jail, concurrent; (7) on September 11, 1991, convicted of petty theft with priors and placed on formal probation for three years; (8) on December 3, 1991, convicted of misdemeanor petty theft with priors and placed on probation for two years, 90 days in jail, with probation terminated May 20, 1992; (9) on April 16, 1992, probation was revoked for commission of petty theft with priors, in lieu of filing; (10) on May 29, 1992, convicted of misdemeanor petty theft with priors and sentenced to 90 days in jail; (11) on January 20, 1993, convicted of misdemeanor petty theft with priors and placed on probation for two years, 13 days in jail, probation was terminated and placed 180 days in jail concurrent; (12) on March 21, 1994, convicted of felony petty theft with priors, placed on probation for three years, 30 days in jail, with probation subsequently revoked and appellant sentenced to 16 months in prison; (13) on December 12, 1994, convicted of felony petty theft with priors and sentenced to 16 months state prison;

## ***Contention***

Appellant's sole contention on appeal is that the trial court abused its discretion by denying his *Romero* motion and refusing to dismiss his prior felony strike. He argues that the strike was remote in time, he had not engaged in any violence since that time, his current offense was minor, his other convictions had only been for petty theft and drug related charges, and he had not suffered any convictions since 2000 "demonstrat[ing] a lengthy period of time of not being involved in criminality." He also argues that his sentence without the strike would still be lengthy. Appellant concludes that "[c]ase law shows that the trial court was presented with sufficient facts to give favorable consideration to his *Romero* motion."

## ***The applicable principles***

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) The court in *Romero* held that a trial judge has the authority to strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero, supra*, 13 Cal.4th at p. 531.) Determining what constitutes "'in furtherance of justice'" requires consideration "'both of the constitutional rights of the defendant, and the interests of society represented by the People . . . ." . . . . At the very least, the reason for dismissal must be "that which would motivate a reasonable judge.'" (*Id.* at

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(14) on May 9, 1996, convicted misdemeanor of possession of controlled substance paraphernalia and placed on probation for three years, 60 days in jail; (15) on July 26, 1996, convicted of felony petty theft with priors and sentenced to two years state prison; (16) on July 9, 1998, convicted of misdemeanor vandalism (§ 594, subd. (b)(4)) and placed on probation for three years, 60 days in jail; (17) on September 15, 1998, convicted of felony petty theft with priors and sentenced to two years in prison, followed by parole violations, and (18) on December 15, 2000, convicted of felony petty theft with priors and sentenced to two years state prison, parole violations on September 28, 2004 and February 27, 2005.

pp. 530-531.) Thus, in deciding whether to strike a prior conviction, “the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) We presume, in the absence of evidence to the contrary, that the trial court considered all relevant criteria (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430).

“[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not “aware of its discretion” to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905.) It only occurs when reasonable minds could not differ that the criminal falls outside the spirit of the three strikes scheme. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

### ***Abuse of discretion***

Appellant argues that there was sufficient evidence before the trial court to have justified it dismissing his felony strike. This argument misconstrues the standard guiding our review. We do not consider if there was evidence that would have justified the trial court to dismiss the strike, but rather, we consider whether its decision not to do so is

irrational or arbitrary and thus an abuse of discretion. We find no abuse of discretion here.

There is no showing that the trial court was either unaware of its discretion or considered impermissible factors. We cannot say that its ruling was irrational or arbitrary. Appellant's prior strike conviction in 1979 was for armed robbery, a very serious offense, for which he was placed in the California Youth Authority. While appellant's charged offense here is comparatively minor, his recidivist history reflects precisely the type of "unrelenting record of recidivism" (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320) at which the "Three Strikes" law is aimed. He has a nearly three decade history since his felony strike of criminal behavior. His past offenses were persistent and recurrent. He was convicted of at least 15 offenses, nearly a dozen of which were for petty theft with priors, the very crime for which he stands convicted here. This repetitious criminal conduct demonstrates appellant's inability to learn from his past mistakes. (*People v. Williams, supra*, 17 Cal.4th at p. 163.) Moreover, his criminal history is punctuated with parole and probation violations, reflecting that even under the watchful eye of parole or probation officers he was unable to follow the rules. This 30-year history best predicts the bleakness of appellant's future prospects. Moreover, after his conviction in this matter, he showed no remorse and continued to deny any wrongdoing, another indication that he refuses to confront and accept responsibility for his wrongful behavior. These facts justified the trial court's ruling.

Appellant argues that his prior strike was incurred many years ago when he was a minor. But it was a serious offense, and no case law compels a judge to strike a prior conviction simply based on its age. (See *People v. Gaston, supra*, 74 Cal.App.4th at p. 320 [reversed trial court order striking a 1981 prior conviction as an abuse of discretion because of the defendant's "unrelenting record of recidivism," characterizing him as "the kind of revolving-door career criminal for whom the Three Strikes law was devised"].) As stated above, appellant's criminal activities have continued largely unabated since his prior strike.

Appellant also argues that he has been crime free since his last conviction in 2000. He ignores that since that time he has twice violated parole after his release.

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, Acting P. J.  
DOI TODD

We concur:

\_\_\_\_\_, J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ